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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHELLE PUTINI, individually
and as Successor-in-Interest to and
Administrator of the Estates of
EVELYN and MURRAY ROGOFF,
deceased; and SUSAN BRENT,
individually, and as Successor-In-
Interest to EVELYN and MURRAY
ROGOFF,

Plaintiffs,

v.

BLAIR CORPORATION, BLAIR
L.L.C., GOLDEN GATE CAPITAL,
and ORCHARD BRANDS
CORPORATION, AND DOES 1
TO 100,

Defendants.

Case No. 09-CV-2729-W (BLM)

**ORDER GRANTING IN-PART
AND DENYING IN-PART
DEFENDANTS' MOTION TO
DISMISS (DOC. 21)**

Pending before the Court is Defendants Blair Corporation, Blair L.L.C., Golden Gate Capital, and Orchard Brands Corpotation's ("Defendants") motion to dismiss. (Doc. 21.) Plaintiffs Michelle Putini and Susan Brent ("Plaintiffs") oppose.

The Court decides the matter on the papers submitted and without oral argument. See S.D. Cal. Civ. R. 7.1(d.1). For the reasons stated herein, the Court **GRANTS IN-PART** and **DENIES IN-PART** Defendants' motion (Doc. 21).

1 **I. BACKGROUND**

2 According to the Complaint, Plaintiffs' mother, Evelyn Rogoff, purchased a Blair
3 robe on or about December 2008, in response to a catalog solicitation. (*First Amended*
4 *Compl.* ("FAC") [Doc 1, Ex. 2] at 5, ¶ 2.) On February 4, 2009, Ms. Rogoff was wearing
5 the robe while making tea in her kitchen. (*Id.*, ¶ 3.) The Blair robe ignited when it was
6 exposed to the surface of the electric burner Ms. Rogoff was using to heat the tea pot.
7 (*Id.*) The fire traveled up the arm of the Blair robe and quickly spread to Ms. Rogoff's
8 neck, face, and chest. (*Id.*) Ms. Rogoff's husband, Murray Rogoff, threw himself onto
9 her to smother the fire and his robe also caught fire. (*Id.*)

10 Plaintiff Susan Brent entered her parent's home, heard their screams, and saw
11 them on fire on the floor. (FAC at 2, ¶ 4.) She grabbed nearby water bottles and doused
12 the flames, then transported her parents to the hospital. (*Id.*) Both Mr. and Ms. Rogoff
13 died as a result of their injuries. (*Id.* at 6, ¶ 4.)

14 Plaintiffs filed this action on October 23, 2009, alleging two claims: products
15 liability and violation of a statute. (*Compl.* [Doc 1, Ex. 1].) On January 15, 2010,
16 Defendants filed the instant motion to dismiss, seeking to dismiss Plaintiffs' second
17 claim, as well as their request for punitive damages. (*MTD* [Doc. 21].)

18
19 **II. LEGAL STANDARD**

20 A motion to dismiss under Rule 12(b)(6) tests the complaint's sufficiency. See
21 North Star Int'l. v. Arizona Corp. Comm'n., 720 F.2d 578, 581 (9th Cir. 1983). The
22 Court must dismiss a cause of action that fails to state a claim upon which relief can be
23 granted. Fed. R. Civ. P. 12(b)(6). A complaint may be dismissed as a matter of law for
24 two reasons: (1) lack of a cognizable legal theory, or (2) insufficient facts under a
25 cognizable theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th
26 Cir. 1984).

27 In reviewing a Rule 12(b)(6) motion, all material allegations in the complaint,
28 "even if doubtful in fact," are assumed to be true. Bell Atlantic Corp. v. Twombly, 550

1 U.S. 544, 555 (2007). Additionally, the complaint and all reasonable inferences
2 therefrom are construed in the plaintiff's favor. Walleri v. Fed. Home Loan Bank of
3 Seattle, 83 F.3d 1575, 1580 (9th Cir. 1996). Nevertheless, conclusory legal allegations
4 and unwarranted inferences are insufficient to defeat a motion to dismiss. Ove v.
5 Gwinn, 264 F.3d 817, 821 (9th Cir. 2001).

6 "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need
7 detailed factual allegations, [citation omitted], a plaintiff's obligation to provide the
8 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a
9 formulaic recitation of the elements of a cause of action will not do [citation omitted]."
10 Twombly, 550 U.S. at 555. Rather, the allegations in the complaint "must be enough
11 to raise a right to relief above the speculative level." Id.

12 13 **III. DISCUSSION**

14 **A. Plaintiffs' First Cause of Action for Violation of a Statute**

15 Defendants seek to dismiss Plaintiffs' second cause of action for "Violation of a
16 Statute" under Federal Rule of Civil Procedure 12(b)(1), which provides that a court
17 may dismiss a claim for "lack of jurisdiction over the subject matter[.]" FED. R. CIV. P.
18 12(b)(1). Defendants argue that because the Federal Flammable Fabrics Act ("FFFA")
19 does not create a private right of action, the claim must be dismissed. (*MTD* at 2.)

20 Plaintiffs do not respond to Defendants' jurisdictional attack, and instead urge in
21 their Opposition that they are not asserting a private right of action under the FFFA,
22 but are instead asserting a negligence per se claim. (*Opp.* [Doc. 28] at 4–5.) Defendants
23 accuse Plaintiffs of using their Opposition to re-draft their complaint.¹ (*Reply* [Doc. 29]
24 at 3.)

25 Plaintiffs' second cause of action is entitled "Violation of Statute (15 U.S.C. 1192
26 et. seq.)." (*FAC* at 6.) Plaintiffs identify Mr. and Ms. Rogoff as within the class of
27

28 ¹Because Plaintiffs do not argue that a private right of action is available under the
FFFA, the Court need not address the issue.

1 people meant to be protected by the FFFA, and accuse Defendants of violating section
2 3 of the FFFA by offering into sale material that failed to conform to the FFFA’s
3 standards. (Id. at ¶ 2–3.) Plaintiffs allege that the violation resulted in the deaths of Mr.
4 and Mrs. Rogoff. Id. at ¶ 4.) As part of their claim for relief, Plaintiffs seek “attorneys
5 fees as provided by law for Violation of Statute....” (Id. at 3, ¶ 11.)

6 The Court agrees that by naming their second cause of action “Violation of a
7 Statute” and seeking attorneys fees based on the violation of the statute, the FAC
8 appears to be asserting a claim for violation of the FFFA, rather than a claim for
9 negligence per se. And because Plaintiffs do not assert that a private right of action
10 exists under the FFFA, the Court will grant Defendants motion to dismiss with leave to
11 amend.

12 **B. Defendant’s Motion to Dismiss Plaintiffs’ Claim to Punitive Damages.**

13 Defendants next move to dismiss Plaintiffs’ request for punitive damages, arguing
14 that Plaintiffs have failed to allege facts sufficient to support punitive damages under
15 California Civil Code Section 3294. Section 3294 requires that a party requesting
16 punitive damages prove “by clear and convincing evidence that the defendant has been
17 guilty of oppression, fraud, or malice...” CAL. CIV CODE § 3294 (a). Focusing on this
18 part of the statute, Defendants urge the Court to apply the heightened pleading
19 standards of Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), to Plaintiffs’ damage request.

20 As an initial matter, the Court is not convinced that the Iqbal standard applies
21 to punitive damage requests. However, the Court need not address this issue because
22 even under the Iqbal standard, Plaintiffs have sufficiently alleged facts to state a claim
23 for punitive damages.

24 Plaintiffs allege that prior the death of their parents, Defendants received timely
25 notice of a similar serious personal injury involving the Blair robe. (FAC at 7.) Plaintiffs
26 further allege that Defendants knew, or should have known, that the robes would be
27 used around stoves. (Id. at 5.) Plaintiffs allege that despite the knowledge and
28 foreseeability regarding the robe’s risks, Defendants did not insert a warning label into

1 the robes, something Plaintiffs allege would have cost approximately one penny per robe.
2 (Id.) Additionally, Plaintiffs urge that Defendants intentionally delayed recalling the
3 robes in order to avoid adverse publicity. (Id. at 7.)

4 California Civil Code Section 3294 defines “malice” as “conduct which is
5 intended by the defendant to cause injury to the Plaintiff or despicable conduct which
6 is carried on by the defendant with a willful and conscious disregard of the rights or
7 safety of others.” CAL. CIV CODE § 3294 (c) (1). The Code defines “oppression” as
8 “despicable conduct that subjects a person to cruel and unjust hardship in conscious
9 disregard of that person’s rights.” CAL. CIV CODE § 3294 (c) (2). Accepting Plaintiffs’
10 factual allegations as true, the Court finds that Plaintiffs have alleged facts sufficient for
11 punitive damages. Specifically, the facts alleged suggest that Defendants engaged in
12 despicable conduct with conscious disregard for the safety and rights of others by
13 allegedly placing their desire for profit ahead of their customer’s safety. Accordingly,
14 Defendants’ motion to dismiss Plaintiffs’ request for punitive damages will be denied.

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16 **IV. CONCLUSION & ORDER**

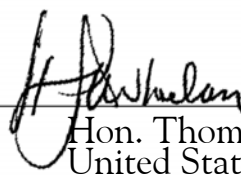
17 For the foregoing reasons, the Court **GRANTS IN-PART** and **DENIES IN-**
18 **PART** Defendants’ motion to dismiss (Doc. 21) as follows:

- 19 1. The second cause of action for violation of the FFFA is dismissed with
20 leave to amend to state a claim for negligence per se.
- 21 2. The motion to dismiss Plaintiffs’ request for punitive damages is denied.

22 Any second amended complaint must be filed on or before **May 21, 2010.**

23 **IT IS SO ORDERED.**

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25 DATED: May 3, 2010

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28 Hon. Thomas J. Whelan
United States District Judge

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